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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ESTEBAN STEVEN MURILLO, Defendant and Appellant.	B198752 (Los Angeles County Super. Ct. Nos. GA044500 and GA059434)

APPEALS from orders of the Superior Court of Los Angeles County, Leslie E. Brown and Steven K. Lubell, Judges. Affirmed in part, reversed in part and remanded.

Barbara Michel, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and John R. Gorey, Deputy Attorneys General, for Plaintiff and Respondent.

Esteban Murillo appeals from denial of his motions to vacate judgments of conviction resulting from his plea-bargained no-contest pleas in each of two cases. The basis of his motions is that the in court admonitions he received about the immigration consequences of his pleas failed to satisfy the requirements of Penal Code section 1016.5.[1] He argues that he was prejudiced by the inadequate advice because he now faces deportation on account of the convictions, and if he had known his pleas could lead to that result he would have gone to trial. The trial court denied his motions, and he filed notices of appeal from each of those orders. The orders are appealable. (*People v. Totari* (2002) 28 Cal.4th 876, 881.) We consolidated the appeals for purposes of appellate review. We now affirm the trial court order denying appellant's motion to vacate in the first of the two orders from which he appeals, and reverse it in the other.

DISCUSSION

Section 1016.5 provides:

"(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

"If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

"(b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation,

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[1] All further statutory references are to the Penal Code.

exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

"(c) With respect to pleas accepted prior to January 1, 1978, it is not the intent of the Legislature that a court's failure to provide the advisement required by subdivision (a) of Section 1016.5 should require the vacation of judgment and withdrawal of the plea or constitute grounds for finding a prior conviction invalid. Nothing in this section, however, shall be deemed to inhibit a court, in the sound exercise of its discretion, from vacating a judgment and permitting a defendant to withdraw a plea.

"(d) The Legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty or nolo contendere is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, it is the intent of the Legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea. It is also the intent of the Legislature that the court in such cases shall grant the defendant a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware of the possibility of deportation, exclusion from admission to the United States, or denial of naturalization as a result of conviction. It is further the intent of the Legislature that at the time of the plea no defendant shall be required to disclose his or her legal status to the court."

In the first of the two cases, Los Angeles Superior Court No. GA044500, appellant was charged with four felony narcotics offenses, two of them involving use of a firearm. (Health and Saf. Code, §§ 11351.5, 11351, 11370.1, subd. (a).) In a plea bargain, he pled

no contest to two of these counts, including one of the counts involving possession of a firearm. He received a suspended sentence and three years of formal probation on various terms, including his serving 365 days in county jail.

Before his plea was accepted, in January 2001, appellant was formally advised, in open court, of the immigration consequences of his plea: "If you are not a United States citizen, you will be deported from the United States, denied re-entry, and denied naturalization or amnesty." He acknowledged understanding this admonition. In January 2007, he moved to vacate the judgment because he had been notified of deportation proceedings initiated against him by the Department of Homeland Security, and was being held in a detention facility by that agency in Arizona.[2]

Appellant faults the admonition as given because while it informed him that his conviction would result in denial of re-entry into the United States, it did not use the statutory language, "exclusion from admission to the United States." The trial court ruled correctly in rejecting this argument.

People v. Gutierrez (2003) 106 Cal.App.4th 169, is directly on point. In that case, as in this one, the defendant was admonished that, as a result of his plea, he "will be deported from the United States, denied re-entry and denied amnesty or naturalization." (*Id*. at p. 171.) Citing the decision of the California Supreme Court in *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 207, and other authority, the court held that substantial, rather than literal, compliance with the statutory language is required and that the words used by the prosecutor were the equivalent of the statutory language. (106 Cal.App.4th at p. 174.) As the court summarized, "[a]ppellant was expressly told that one of the immigration consequences of his conviction was that he would be denied

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[2] Appellant initiated a habeas corpus proceeding claiming that he was in constructive custody of the State of California and seeking relief. The trial court granted the writ. In an unpublished opinion (*People v. Murillo* (Oct. 22, 2008, B205873)), we reversed the trial court's order because appellant had completed his term of custody and probation and was not in actual or constructive custody by the State of California. We held that, in these circumstances, the writ did not lie.

reentry into the United States; in other words, under the statute, he would be excluded from the United States. The trial court, thus, substantially complied with the statute, and, hence, committed no error in the manner in which it took appellant's plea." (106 Cal.App.4th at p. 174.)

Appellant seeks to distinguish *Gutierrez* because, in that case, the defendant was given a written waiver form that replicated the words of the statute, while that was not done in the case before us. While this further step was taken in *Gutierrez,* the court cited it as an alternative basis for its decision: "Even if we were to consider the variance in language used by the prosecutor as reversible error in a vacuum, there was no such void, as any error was concurrently cured by the written waiver of rights form utilized by the trial judge in accepting the plea." (106 Cal.App.4th at pp. 174-175.) Appellant also argues that the case is distinguishable because Gutierrez was seeking re-entry to the United States from a foreign country, while appellant was already in this country. We fail to see how this distinction can make a difference.

The second case, Los Angeles Superior Court No. GA059434, arose out of a 2005 information charging appellant with aggravated assault and street terrorism, both felonies. (§§ 245, subd. (a)(1) and 186.22, subd. (b)(1)(A).) In a plea bargain, he pled no contest to the assault charge and received a three-year state prison sentence, and the street terrorism charge was dismissed. The section 1016.5 admonition in that case stated: "If you're not a citizen of the United States, entering your plea will result in your deportation, denial of citizenship, naturalization or amnesty." Appellant acknowledged understanding this warning. His motion to vacate the judgment was filed in January 2007, based on the difference in language between the admonition and the statute.

The prosecutor conceded that the admonition failed to address denial of re-entry into the United States, but argued that the omission was harmless. The prosecution relied on *People v. Totari*, *supra*, 28 Cal.4th 879, which holds that section 1016.5 error is not automatically reversible, but is subject to the harmless error rule. Prejudice is a factual issue for determination by the trial court. (*People v. Superior Court (Zamudio), supra,* 23 Cal.4th at pp. 199, 209.) With respect to this motion, appellant furnished a declaration

that at the time he entered his plea he was not aware that the conviction would result in mandatory exclusion from admission to the United States, and was surprised to learn, from the Immigration and Naturalization Service, that it was. He declared that if he "had known beforehand that [he] was bargaining away my 'green card' and my ability to remain in the United States by pleading guilty, I would never have agreed to a plea and would have exercised my right to a jury trial."

The prosecutor argued that since appellant was not present in court but was being detained by federal authorities, she did not have an opportunity to cross-examine him as to prejudice, and particularly about his claim that he did not receive the necessary admonition. She argued that the declaration was hearsay and should be stricken, and that without it, appellant had made no showing of prejudice. The trial court struck the declaration and denied the motion to vacate.

The trial court erred; the declaration was not excludable hearsay. (*People v. Superior Court (Zamudio), supra*, 23 Cal.4th at p. 201.) Respondent acknowledges that "[*i*]*f* the trial court had accepted as true the assertions in appellant's declaration, it appears appellant would have successfully established prejudice for the granting of his motion," correctly citing *People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1246.) But, unlike the judge in *Castro-Vasquez*, the judge in this case did not accept appellant's assertions as true and, with his declaration stricken, there was no evidence before the court to show prejudice. That may be so, but the source of the failure of evidence is the erroneous striking of the declaration as hearsay.

Respondent argues that even if the declaration had not been stricken, it would not necessarily mean that prejudice was established, since the court is not required to "accept at face value appellant's self-serving claim that he would not have pled guilty had he been advised differently." True, but the trial court could have accepted it and we cannot know on this record that the assertions would have been rejected.

Respondent also argues that many of appellant's assertions, concerning family members dependent on him, the length of time he has been in the United States, and his gainful employment, have no bearing on prejudice. But respondent misses the point

appellant is trying to make: his residence in this country for almost his entire life, and his family's dependence on him would have motivated him to take his chances on a trial rather than face deportation without possibility of re-admission. Whether appellant would be believed in this claim is precisely the question the court did not answer in light of its erroneous striking of the declaration. Appellant is entitled to a judicial determination of his claim of prejudice in which the court considers his declaration. The order denying the motion to vacate the conviction in GA059434 must be reversed.

DISPOSITION

The order denying the motion to vacate the judgment in GA044500 is affirmed; the order denying the motion to vacate the judgment in GA059434 is reversed and the matter remanded for further proceedings consistent with this opinion.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.